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No. 02-1439

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

CHRISTINE A. CUMMINGS, *et al.*,
*Petitioners*,

v.

KATHLEEN CONNELL; MARTY MORGENSTERN; AND CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, SEIU, AFL-CIO, CLC,
*Respondents*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## RESPONDENT MORGENSTERN'S BRIEF IN OPPOSITION

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## RESPONDENT MORGENSTERN'S BRIEF IN OPPOSITION

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## ARGUMENT

### Introduction

The Petition should be denied because it presents no important issue which requires the attention of this Court. Moreover, the Petition fails to identify a *bona fide* conflict in the law between the circuits or between the Court of Appeals' decision and a decision of this Court.

This Court recently denied a Petition for Writ of *Certiorari* from a decision of the Ninth Circuit filed by the same counsel from the National Right to Work Legal Foundation, Inc. (hereinafter "Right to Work") who represents Petitioners here, raising the second and third questions that Petitioners seek to raise here. See *Prescott v. County of El Dorado*, __ U.S. __, 123 S.Ct. 1251 [154 L.Ed.2d 1019] (2003). Prior to

that, this Court denied a Petition for Writ of *Certiorari* from another decision of the Ninth Circuit filed by Right to Work raising the first question that Petitioners seek to raise here. See *Foster v. Garcy*, 535 U.S. 1112, 122 S.Ct. 2327 [153 L.Ed.2d 159] (2002). For the same reasons that the Court denied the petitions in *Prescott* and *Foster*, it should deny the Petition here.

## I. THIS COURT SHOULD DENY THE PETITION FOR THE SAME REASONS THAT IT RECENTLY DID SO IN *PRESCOTT* AND *FOSTER* REGARDING THE ISSUES OF PUBLIC EMPLOYER LIABILITY, FEE PAYERS' STANDING TO CHALLENGE THE FAIR SHARE FEE INDEMNIFICATION AGREEMENT, AND THE CONSTITUTIONALITY OF THE INDEMNIFICATION AGREEMENT.

Respondent, Marty Morgenstern, is the Director of the Department of Personnel Administration, a department within the executive branch of state government for the State of California.

In their first three Questions Presented, Petitioners seek *certiorari* on the following issues: (1) the liability of public officials for collecting fair share fees under a legally deficient Hudson notice; (2) the standing of fee payers to challenge an agreement whereby the union agrees to indemnify the public employer against claims arising from the collection of fair share fees; and (3) the constitutionality of such an indemnification agreement. (Petn. at p. i.) Petitioners in *Prescott v. County of El Dorado*, ___ U.S. ___, 123 S.Ct. 1251 (February 24, 2003), represented by the same Right to Work counsel who represents Petitioners in the instant case, sought to raise the second and third of those issues before this Court. The Court, however, denied their Petition for *Certiorari*, just two months ago. *Id.*

Prior to *Prescott*, Petitioners in *Foster v. Garcy*, 535 U.S. 1112, 122 S.Ct. 2327 (June 3, 2002), who were also represented by Right to Work counsel, sought to raise the first issue raised here, i.e., the liability of public officials for collecting fair share fees under a legally deficient Hudson notice. The Court, however, denied their Petition for *Certiorari*, less than one year ago. *Id.*

The Court of Appeals in the present case relied on its prior decision in *Foster v. Madhesian*, 268 F.3d 689 (9th Cir. 2001), cert. denied *sub nom Foster v. Garcy*, 122 S.Ct. 2327 (2002), for its holding that the defendant public officials cannot incur any liability under the facts of this case. (See Petn. App. A at 18a-19a.) Similarly, the Court of Appeals in the present case relied on its prior decision in *Prescott v. County of El Dorado*, 298 F.3d 844 (9th Cir. 2002), *cert. denied*, 123 S.Ct. 1251 (2003), for its holding that Petitioners lack standing to challenge the fair share fee indemnification clause. (See Petn. App. A at 21a.) These are the very decisions as to which this Court recently denied *certiorari*.

Nothing has changed since this Court denied a similar Petition for *Certiorari* on these same issues just two months ago. The Court of Appeals' decision merely applied precedents as to which this Court has already denied *certiorari*. There is no need here to repeat the arguments made by the respondents in *Foster* and *Prescott* as to why *certiorari* is not warranted. Rather, Respondent Morgenstern refers the Court to those arguments and respectfully requests that the Court deny the Petition in the present case as to the first three Questions Presented for the same reasons that it denied the similar petitions in *Prescott* and *Foster*.

## CONCLUSION

Petitioners have failed to present an important issue which requires the Court's attention. Petitioners have also failed to identify a *bona fide* conflict between the circuits or between

the Court of Appeals' decision and a decision of this Court. The first three Questions Presented in the Petition have been previously considered and rejected by this Court for review. There is nothing unique in the facts or law governing the present case that merit further consideration by the Court. Accordingly, the Petition should be denied.

Respectfully submitted,

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